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Cremers, Jan

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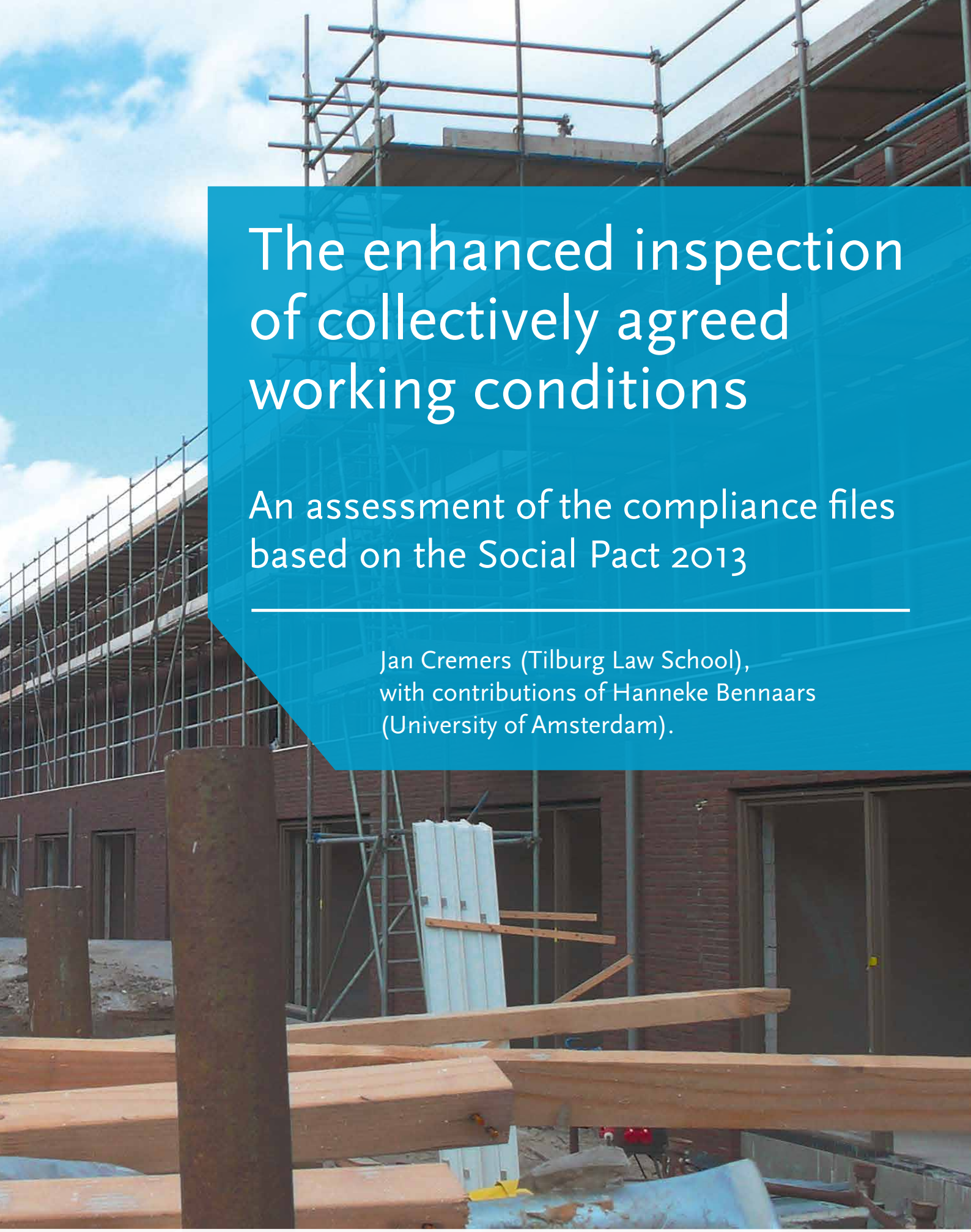

The enhanced inspection of collectively agreed working conditions

An assessment of the compliance files based on the Social Pact 2013

Jan Cremers (Tilburg Law School),
with contributions of Hanneke Bennaars
(University of Amsterdam).

Tilburg University

Understanding Society

The enhanced inspection of collectively agreed working conditions

An assessment of the compliance files, based on the Social Pact 2013

Tilburg Law School/Department of Labour Law and Social Policy

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Content

The enhanced inspection of collectively agreed working conditions

An assessment – Jan Cremers

Introduction

In April 2013, the Dutch social partners prepared a social agreement that led to a social pact with the government. The deal included two interesting policy measures related to the control and enforcement of applicable pay and working conditions. One measure provided for the installation of a specialised unit within the labour inspectorate focussing on practices of artificial arrangements, like letterbox companies. A second measure targeted to improve the cooperation between the labour inspectorate and the social partners in the field of compliance with and enforcement of collectively agreed pay and working conditions. A new working method was introduced whereby the opportunity was created for the social partners to ask the labour inspectorate for intensive research, in cases where the applicant suspected breaches of the agreements.[1] The labour inspectorate had to report on these demands. This policy became operational in early 2014. To a certain extent, this new policy was developed in parallel with the implementation of enforcement legislation that was developed, especially in the field of cross-border recruitment and posting of workers, in the same period.[2]

In the autumn of 2016, trade union FNV asked the author to assess the new procedure related to compliance with bargaining agreements and to analyse both the union demands and the resulting reports with findings. In addition, the request was to analyse whether there were any circumvention mechanisms at stake in the suspected cases that the union had traced. Finally, the FNV asked for an overall effort to assess the adequacy and effectiveness of the available compliance and enforcement instruments.

In this paper, the main results of the assessment are described. The first section explains the methodology and the working methods of the research team. The second section summarises the relevant parts of the social pact. Section three describes the characteristics of the investigations; it also deals with the specific articles of the legislation referred to in the submitted demands. Section four reviews the results of the analysis of the demands and the resulting reports of the inspectorate. This section includes an overview of current 'saving models'. The fifth section provides the reader with a synthesis of the findings, the disclosed mechanisms and artificial arrangements, and an assessment of the cooperation between the applicants and the inspectorate. The last section formulates recommendations, both in the legislative field and in the area of practical cooperation and compliance enforcement. Given the fact that some of the analysed cases are still before court or subject to ongoing negotiations, the team made the choice to treat the files in a confidential way. Therefore, the data that refer to concrete cases are published anonymously.

The final report, *Drie jaar ervaring met intensievere cao-naleving*, was handed over to the FNV. The report was launched during a conference (7 June 2017) with representatives of the labour inspectorate, social security and tax authorities, representatives of the social partners and several involved ministries. The representatives of the different compliance authorities largely affirmed the findings and endorsed most of the recommendations. Given the short period of time that the team could work on the matter and the complexity of the issues that correlate with or interfere in this area, more in-depth study is necessary in order to define and operationalise the necessary instruments (for the legislator, the compliance authorities and the social partners).

Methodology - working method – the selected files

A research team, led by the Tilburg Law School and commissioned by trade union FNV, analysed in the period November 2016 to February 2017 several files that had been under investigation of the Dutch labour inspectorate under the procedure that was agreed in the social pact.[3] On the one hand, each file consisted of one of more written demands by the trade unions (or another stakeholder authorised by the partners in collective bargaining – see below), underpinned with documents and statements that indicated possible breaches and violations related to applicable collective agreements. The research team had the opportunity to analyse the complete file as submitted to the labour inspectorate. On the other hand, the team gained access to the labour inspectorate's reports with findings and replies to the questions that the applicant stakeholder had raised. We did not analyse the individual follow-up, once the applicant had received the replies in the labour inspectorate's report. Although we discussed important lacks and gaps that might have consequences for a follow-up, the choices and considerations how to proceed in the individual cases, based on the replies and undertaken at a later stage, were not part of the research. The analysis was not an evaluation of the subsequent action in each individual case.

Next to an assessment of the functioning of the procedure laid down in the social pact, the aim of the research was multiple. The team had to broaden up the analysis beyond the respect for collectively agreed wages and working conditions. We looked after the use of artificial arrangements and other mechanisms of social dumping and had to determine ongoing developments in the field of compliance control and enforcement. The team analysed the documentation and checked whether there were clear indications of structural breaches of (parts of) the provisions laid down in collective agreements and other regulations of working conditions. A special checklist or 'matrix' served as the main reference for this analysis (annexed). The matrix looks after the position of workers from four perspectives (pay and working conditions, social security, the labour contract, rules and regulation related to labour recruitment). Based on this matrix, it was possible to apply an integral analysis. For each file, we analysed the appearance of methods to circumvent statutory wages and other wage costs. But the analysis also focussed on the eventual evasion of employers' costs and taxation, fake posting, improper application of social security registration and the abuse of the A1-form, artificial arrangements and fictitious relationships between companies, incorrect hiring or contracting out of workers, bogus self-employment, unfair or unreasonable deductions, excessive working time and non-compliance with other work related provisions.

The submitted demands refer to two legal articles that enshrine the respect for collectively agreed pay and working conditions (article 10 of the Act on generally binding agreements and article 8 of the Act on Agency work – explained below). Both articles provide associations of employers and trade unions with the possibility to send in a demand to the labour ministry for an investigation. Trade union FNV has installed (since 1 May 2014) a special unit that looks after compliance and enforcement of collective agreements. The unit collects evidence on possible breaches, visits sites together with regional and local trade union colleagues, tries to underpin demands with background information and weights the changes for (legal or conventional) procedures. The bulk of the demands is coming from that unit or from paritarian compliance offices installed by the social partners (in the agency sector and the construction sector). The demands are all on questions related to underpayment and non-respect for pay and pay-related working conditions laid down in collective agreements. The responsible unit at the labour ministry (hereafter I-SZW)

functions in practice on the basis on the submitted demands. I-SZW investigates the raised issues and replies in reports with statements and answers. The answers may incite the applicant to start negotiations with the involved employer(s) or principal(s). It can lead to talks on compensation and recovery, to possible conventional redress, to legal action and other juridical claims.

The investigated files cover a broad range of projects and workplaces and the submitted demands spread out over several branches and industries with different collective agreements and regulations. In order to establish a certain coherence between different dossiers, and partly with a view to a workable classification for the analysis group, the team clustered the dossiers shortly after the start of the investigation. Spread over seven clusters, 27 files were investigated. The classification is partly due to the order in time, in conjunction with the same companies involved (scaffolding I and II), partly from similarities in the phenomenon (contracting, self-employment), partly from sectoral considerations (international transport, construction, shipbuilding). Soon we found out that the number of companies found in the files could be much larger. Due to the frequent use of (a labyrinth of) domestic and foreign subsidiaries, subcontractors, labour brokers, temporary employment agencies and other hiring intermediaries, long and complex recruitment chains often arise (in the cluster Scaffolding I, we found a jungle of 55 subsidiaries and subcontractors in four interrelated files).

Cluster	Investigated files
Scaffolding I	4
Scaffolding II	4
Road haulage	5
Contracting	2
Construction	5
Ship building	3
Self-employed (bogus)	4

The team used its own expertise and all available and relevant sources, including interviews with outside experts and the inspectorate. Moreover, the coordinator has a long experience in working as an expert with the inspectorate in a series of projects at EU-level that focus on cross-border work, enforcement and compliance.[4] The members had complementary qualifications and experiences (related to labour and contract law, free movement issues, labour migration and cross-border work) that worked out well.[5] The analytic phase consisted of the following steps:

- The analysis of a representative sample of submitted requests.

In the period 2014-2015, the labour inspectorate finalised 42 investigations based on submitted requests. The team analysed 27 of the underlying files (the requests with all the annexed documentation as prepared by the applicant). Independent from the applicant, an assessment was made of the submission: was it logical, adequate and complete? With the relevant items raised in concrete questions? Did the applicant use the correct legal basis?

- The analysis of the labour inspectorate's investigation reports.

A next step was a review of the received labour inspectorate report (often with pay slips, time registrations, reports of interviews and other evidence annexed). We checked the completeness, the consistency and the scope of the performed investigation. Based on the many annexes of most reports, it was possible to compare and examined the reported findings with the provided and collected documentation. The team looked after the usefulness of the reported findings in relation to the content of the request.

- Summarised findings per cluster, including a description of identified mechanisms.

The analysis led to basic reports per cluster that served as working documents. The research team discussed these working documents at biweekly meetings, sometimes in the presence of a FNV officer with knowledge of the cases or industries concerned. The working documents, together with the results of the consultations and deliberations, served as the primary components for the final report.[6] The regulatory matrix functioned as the main reference for the description and the analytic synthesis of the applied mechanism and cost saving methods.

The social pact 2013

The social partners and the government agreed in a social pact in April 2013 to enhance the control and enforcement of collective agreements and the policy that tackles artificial arrangements. This led to the creation of a new program, 'Tackling artificial arrangements and contract compliance'.[7] For the implementation of the program and the equipment of the control tasks, the responsible department of the ministry of labour (I-SWZ) engaged additional (temporary) staff for the years 2014-2018 (8.5 labour inspectors).

The concluded text of the pact has a much broader scope. Next to the two envisaged items, other proposals to improved labour relations and limitations to flexibility figure in the text that are closely linked: tackling circumvention of social security and tax obligations, improvement of subcontracting regulations, limits to the use of flexible work, better regulation of triangle labour relations, investment in (vocational) training and employability. In fact, this list is an argument for horizontal and integral assigned tasks for the competent control authorities. After all, except for the training theme, all other problems (like fake self-employment, circumvention of the statutory minimum wage, and evasion of social security contributions) interfere directly with the enforcement of the provisions and working conditions that stem from the legislative and conventional frame in the Netherlands. However, the pact did not provide the inspection services with a more horizontal, tailor-made competence beyond the enhancement of the control procedure.

The lack of such a coordinated approach is the more striking as the pact mentions examples of these interrelations. For instance, the control of the respect for the statutory minimum wage in contracting situations has to go hand in hand with control of the genuine character of self-employment. Some of the recommendations, such as the prevention of situations of illegal or undeclared labour, a stricter application of the host country principle in the field of social security and taxation, and the prevention of abuses linked to the circumvention of employers' obligations, are closely related to the respect for and compliance with conventionally agreed provisions. Integral competences to control and act would have been a more logical approach. This has not been settled, apart from the improvement of the cooperation between social partners and the actors in subcontracting chains with regard to the fight against artificial arrangements. For the latter task, the pact resulted in the creation of an Information and Expertise platform.[8]

The applicable legislative and conventional frame

As said beyond, the I-SZW starts with an investigation based on the submitted requests that are normally limited to questions on respect for collectively agreed pay and working conditions, including the pay and hiring conditions of temporary agency workers. The requests refer to the application of the rules related to generally binding provisions (article 10 of the Act on generally binding agreements) or the application of the rules on working conditions for agency workers

(article 8 Temporary agency act). The questions raised are about pay, bonuses and other pay related provisions. Questions of breaches stemming from other aspects of the working conditions (like health and safety or working time) do not figure prominently in the submitted compliance and enforcement files. I-SZW reports along the lines of the requests with investigation statements and findings. In the period 2014-2015, I-SZW finalised 42 inspection reports in this frame that looked after contract compliance. According to a summary, produced by I-SZW at the end of 2016, the overwhelming majority of the requests came from trade union FNV and its affiliates (32 out of 42). The other requests came from applicants like the SNCU (the paritarian compliance office, installed by the collective bargaining partners in the agency sector) and the TBB (a paritarian organisation in construction).

The investigated files have some characteristics in common. The bulk of the involved workforce, both Dutch and foreign workers, is engaged through one or the other form of outsourced recruitment, in hiring or subcontracting chains. Problems with compliance in case of directly engaged staff does not figure in the files. The legal perspective (which legislation applies, which agreement, who is the employer) is complicated and depends on the contractual relationship and other factual circumstances between the worker and the intermediate, but also between the user undertaking and the go-between. Most of the work in the files is carried out in the Netherlands, though workers can be recruited from other EU member states or have their normal workplace outside the Netherlands.

The different relevant variables that appear in an often-interrelated manner are:
I. The registration of the employer or firm (the Netherlands – another EU-country – a third country).
II. The country where the worker normally carries out his labour (the Netherlands – another EU-country – a third country).
III. The collective agreements that apply (no agreement – an agreement, whether or not generally binding – several and different agreements applicable for the hiring contractor and the supplying contractor, generally binding or not).
IV. The contractual relationship between the worker and the undertaking. This relationship can vary from a direct or indirect labour contract, a contract for the provision of services, a contract based on hiring or the supply of labour, a payroll relationship, a contract based on posting, contracts stemming from intra-company lending of personnel or from commercial contracts between a user undertaking and subcontracting firms.

One of the starting points for the investigations is the question of the territorial legal frame that applies to the enforceable working conditions and agreements. With regard to the relevant constituency, three situations can be identified:
1. A complete national context with the integral application of the Dutch legal frame of labour legislation and collective agreements. Compliance then goes back to the interpretation and anchoring ground of the collective agreements, their effects and validation and the question of whether or not these agreements are generally binding. The investigation focusses on the correct application of the legal and conventional provisions. In the Dutch case, the regulation of agency work and the correct hiring belongs to this frame of reference.
2. A cross-border context with reference to the free movement of workers. Foreign workers that enter the country under the flag of the free movement of workers and serve under a labour contract in the Netherlands can rely on the same protection as Dutch workers. This means that,

once an investigation leads to the conclusion that the free movement of workers principle (based on article 45-48 TFEU) applies; other constituencies are no longer relevant.
3. Cross-border posting of workers in the frame of the provision of services. In case of posting, international civil law prescribes the application of the relevant foreign contract law. However, the posting of workers directive, implemented in the WagwEU, provides the posted workers with a hard core of working conditions of the receiving country that have to be respected. This hard core is enshrined in the Dutch law on statutory minimum wages (WML), in legislation related to minimum holiday payments, in working time regulations, in occupational safety and health legislation, in temporary agency work regulations, in several parts of the Civil Code and in key parts of generally binding collective agreements.

In these three situations, not only the direct labour costs stemming from pay and working conditions can lead to infringements. Also the indirect employers' costs, the social security contributions and the statutory income tax (next to the general regime on turnover and corporate income tax) have an impact on the total labour costs and thus on the level playing field for firms. In such a situation, both matters of civil and of private law are at stake, with a mixture of labour legislation, social security legislation and fiscal policy. In practice, these labour and turnover related costs have their own regulations that have led to a variety of fiscal 'optimisation', regime shopping and social engineering in the European Union.[9]

The registered broad variety of contract forms, labour relations and legal frames often hinder an effective control of the proper pay and working conditions and the adequate enforcement, in case breaches are found. Redress of infringements can be initiated at three levels: the individual level of civil procedures, the level of the signatures of collective agreements and working rule agreements, and finally the state the as the legal supervisor and enforcer. The juridical frame for the control and enforcement tasks of the labour inspectorate stems from different sections of the Dutch legal system. The inspectorate has the task to control and enforce a wide-ranging field of acts and regulations (such as the Act on the statutory minimum wage and minimum holiday pay, the supervision and enforcement of the occupational safety and health regulations, the working time regulations, the Act on temporary agency work, Acts on equal treatment, on foreign labour, on posted workers and on wage formation). The inspectorate has no direct involvement with tax issues or social security legislation.

In recent years, new legislation that stems from national and European regulations extended the tasks and competences. The competences that can be derived from these regulations were not (or only partly) applicable to the analysed files. An important new legal provision in the Netherlands in the policy to tackle artificial legal entities is the Act on fighting artificial arrangements. The act settles the liability in subcontracting chains and has come into effect in phases starting mid-2015. The Act provide I-SZW with the competence to identify foreign workers (as from 1 July 2015). It also prescribes conditions for pay slips and pay methods. I-SZW publishes a regular list of controlled companies. As of 1 January 2017, this act prohibits deductions for food and lodging on pay that result in wages below the statutory minimum. Another new Act is the implementation of the EU Enforcement Directive, finalised in the early summer of 2016, with new registration and identification competences. Moreover, as a result of the Act on statutory minimum wages, the I-SZW unit has since 1 July 2015 the legal competence to report in the contract compliance procedure on findings that are related to other parts of the social acquis (like the Act on the statutory minimum wage).

However, the direct frame and procedures for the work of the I-SZW unit that the social pact refers to in the compliance paragraphs emanate from two key acts:

- A procedure based on article 8 of the Act on temporary agency work (Waadi) on the valid use of and compliance with hiring provisions. Reference in the submitted demands to this Act may lead to the examination of the genuine character of the hiring of workers and controls of the mandatory respect for the principle of equal pay for equal work.[10]
- A procedure based on Article 10 of the Act on generally binding collective agreements (AVV act). This article settles the right for employers' organisations and trade unions (as partners in collective bargaining) to ask for compliance investigations. Their submission can initiate control of the agreed pay and working conditions and checks of possible violation of generally binding collective agreements. The bargaining partners must have concrete suspicion of breaches and non-respect, and consider legal action.[11]

The social partners have the possibility to transfer their compliance competences, including the disposition to juridical measures for redress and compensation, to legal entities founded by the partners, especially for this task. In case of jointly formulated requests, a concrete suspicion is not conditional. The paritarian bodies in the agency sector and in construction have likewise access to the I-SZW procedure and can submit requests. I-SZW informs the applicants over the inquiry, the art of the investigation and the findings.

The analysis of compliance practices

a. The submitted requests

The submitted requests are the starting points for the I-SZW investigation. Therefore, the formulation of the demands in the requests is crucial for the results. This fact puts a lot of pressure on the applicant. Questions and demands have to be formulated with high accuracy, also because a vague notion of non-compliance suffices not for a submission. I-SZW applies the following guiding conditions for requests:

- The applicant formulates which generally binding agreement was/is at stake, with reference to the period that the agreement was/is in force;
- The prescribed suspicion of non-compliance with generally binding agreements must be motivated, mentioning the articles concerned and the provisions under suspect;
- Notice of the period of breach (taken into account the duration of the generally binding effect);
- Several formal conditions (right name of the firm, firm details and registration details of the involved firms and legal entities);
- The requested period of investigation and the workforce that has to be investigated;
- In case of more firms, a submission must follow for every separate firm;
- For article 10 (AVV act) submissions, the law prescribes reference to future redress procedures.

The analysis of the submitted requests shows that the content of the submissions varies a lot, depending, for instance, on the sector or industry concerned, the related agreements and provisions, the character of the existing suspicion and the nature of the breached provision.

In the clusters *Scaffolding I and II*, the recruitment of workers takes place through hiring via subsidiaries or the use of cross-border posting of workers in chains of subcontracting. The first submissions (in Scaffolding I) focus on the application of the collective agreement for the

construction sector in the subcontracting chain (and the related application of some elements of the agreements for temporary agency workers), especially the non-respect of pay and wage scales and other agreed financial allowances (holiday pay, overtime bonuses). Important reference is the obligation to ascertain the compliance with the hard core of the provisions in the construction agreement by hiring firms and subcontractors. Additional demands ask for the inquiry of tariffs, used by subcontracting further down the chain. Detailed questions deal with pay slips, hiring contracts, registration of working time and leave, deduction for transport and lodging. In the files with agency firms present, reference is made to articles from the agency sector agreement that have settled the fine-tuning in pay and wage scaling in the agreement for construction and the temporary agency sector agreement. In the second batch of submissions (Scaffolding II), the requests are of a much broader character and more questions on additional working conditions are included, such as the mismatch in the scaling related to qualifications and work experience or the incorrect application of hiring conditions. The submission in this cluster refer to both the article 8 Waadi and the article 10 AVV procedures.

In the *Road haulage* cluster, the main phenomenon is the recruitment truck drivers through foreign subsidiaries or other intermediating entities. The requests focus on suspicions of underpayment, and the use of drivers based on the working conditions of the home country. The main reference for compliance stems from articles of the collective agreement for road haulage. Other important parts of the reference are the sector's national and European regulations of cabotage and international road transport. The applicants ask for to actual driving statistics and tachograph data, information related to the crew, outsourcing contracts, working time and wage calculation methods, place of departure and termination and licenses. In case of hiring, questions are raised about the pledged working conditions, and the instruction method and direction of the driver. The requests that were submitted later on in this cluster ask explicitly for the establishment conditions and permits of the foreign entity. The underlying drivers in such cases are the determination of the employer status and the assignment of several and chain liability.

The *Contracting* cluster assembles artificial arrangements in which a part of the primary production process in companies is transferred completely to a hired workforce from a third party. To this cluster, we found cases of firms that act as mediator for (foreign) flex workers or organise gangs of flex workers. These workers receive the minimum statutory wage. The main reference is the non-respect for the collective agreements in the temporary agency sector and/or the application of article 8 Waadi that settles the fine-tuning of pay and wage scaling between the agency sector agreements and the provisions on the hiring of workers in sectoral collective agreements. The contracting firm suggests that the work is carried out in the frame of a commercial contract for the provision of services and that the status of temporary agency worker does not apply to these workers. The applicant takes the stand that the arrangement leads to fake contracting as all characteristics lead to the conclusion that this is actual hiring. Thus, the agreement for the temporary agency sectors applies from day one. Key questions relate to the subordination of the worker and the user firm, the lead and guidance, planning and production processes.

In the cluster *Construction*, some interrelated and intertwined requests were bundled pinpointing relatively large contractors whose core activity is the hiring and placing of building workers. The firms develop and shape the temporary hiring. They functions as a go-between for main contractors and subcontractors on site. Legal reference is article 8 Waadi, often in combination

with article 10 AVV. The main aim is to receive information for the determination of the client and/or employer and the assignment of liability. The requests refer to underpayment and irregular hiring of the workforce, pinpointing key questions like too low scaling and too low hourly wages. Part of the investigation should be dedicated to the possible appearance of (bogus) self-employed. The questions deal with the nature of the performed work, the workers involved, the years of service and the subordination. Other demands refer to certification and the compliance with the ascertain obligation (the obligation to inform the user firm about the applicable working conditions in the construction sector). Practical questions raised are the scaling and match with qualifications, the gross and net wages, holiday payments and other pay related conditions. Over a longer period, the requests become clearer and more accurate.

In the cluster *Shipbuilding,* we find requests with as the main subject the underpayment of foreign workers. In all cases, workers are recruited through foreign legal entities, both subsidiaries and independent agencies or other intermediates. The demands ask for information about the actual composition of the workforce, details about the remuneration, the scaling of workers, overtime, the payment of (paid) holiday, several wage components, travel costs, lodging. Other demands deal with the contracts and agreements that build the underlying base for the employment relation or with the allocation of the employer status. An important part of the requested investigation should go into the composition of the chain of companies, contractors and establishments. Moreover, the liability of the client is at stake. The reference for the applicants comes from the 'ascertain obligation' (the obligation to inform the user firm about the applicable working conditions in the sector) and from binding provisions at the user firm that have to be respected and complied with by the lending undertaker or agency.

b. The labour inspectorate reports with findings

Against the background of the complexity of the subjects that the labour inspectorate is confronted with, earlier research led already to the conclusion that the inspectorate's competences are limited. Investigations that can be crucial for the examination of a case, for instance related to social security payments and registration, income taxation or the genuine character of a firm, go beyond the own policy area and, thus, the necessary competences. If necessary and urgent, findings in adjacent policy areas are reported to other departments, with no further follow-up. In some files, the inspectorate drops further action, simply because the necessary investigations is disproportional time-consuming.

I-SZW sticks to a pragmatic mission attitude, once a request is honoured and answered in a report with findings, it is up to the applicant to act. A follow-up from the side of the inspectorate is not seen as being part of the action. The answers to the questions is what counts. This can also have the effect that incidentally encountered 'bycatch' is not reported, although some of the annexes may be dedicated to such incidental findings. To a certain extent, the inspectorate is reluctant to investigate possible not requested offenses that inspectors encounter unexpectedly. Individual inspectors see this also as somewhat 'unfair' towards the investigated firm. As a consequences, the reporting to other policy departments deals mainly with major offenses.

The reporting differs, depending on the legal base. Reports that refer to article 10 of the AVV act contain findings without any further conclusions. The article 8 Waadi requests lead not only to investigations and to reporting on decent hiring of workers and equal pay for equal work, but also contain conclusions about the compliance with the provisions and the genuine character of the hiring.

If the inspectorate is confronted with labyrinths of cross-border firms and establishments, cooperation with foreign colleagues and competent authorities is of key importance. Bilateral contact has improved over the years. However, the problems with too limited competences in adjacent angles of social policy become even more manifest in the transnational cooperation (for both the Dutch and the foreign inspectorate).

Investigation and research on artificial arrangements is strongly hindered by the primacy that is given to economic freedoms in the EU. This primacy, notably the freedom of establishment and the freedom to provide services, can obstruct the work of the inspectorate. Even in cases with clear evidence that firms are completely fake, the inspectorate in the country where the work is carried out has little to say about the genuine character of such a firm. Consequently, the handling of these cases leads to frustration and inadequate final settlements ('we formulate a robust demand that is posted to a foreign address and we know that it will be delivered in an empty post-box'). Reports with findings that concern foreign intermediates or firms are, therefore, often short and with very limited content.

I-SZW has drawn up the answering of the requests for the clusters *Scaffolding I and II* in various reports per case (bundled for our analysis in 8 files). The answering to the first series requests dates from May 2015, the second series takes place in the period September-November 2016. Comparatively, the answers in the reports with findings of the first period and the answers for the second period are quite different. The first series belongs to the initial first requests that the FNV submitted in the frame of the article 10 AVV procedure, with only incidentally a reference to the article 8 Waadi procedure. One of the striking differences between the two series is the size of the reports. I-SZW delivers the first batch of reports with an average size of 5 to 6 pages, whilst the reports in the second period contain 8 pages or more. The content of the investigations is different and so is the answering. The second series shows more substantive details and the compliance aspects of article 8 Waadi are more often used as a reference. The reporting as such changes too: the structures of the reports becomes more systematic, with the use of multiple (sub) headings and the attachment of several attachments that serve as a reference in the report. Even more important is the fact that the second batch of reports, notably those referring to the article 8 Waadi procedure, articulates, next to the main findings, an outspoken conclusion that (most often) goes beyond the plain facts and findings. Such conclusions can be found under the subheadings *Non-compliance observed of article 8 Waadi* and *Hiring firm considered as non-complier*. This leads to conclusion such as: *'I, inspector, consider the non-complying firm X as the offender that has derived the workers A to Z from the right of equal treatment, at least of the same or comparable working conditions as those applicable to workers employed in comparable occupations and positions in the user firm'*.

With one exception, the first series of reports are of moderate quality. Some demands are not really investigated or the answering shows that no real fact-finding has taken place. The findings are often limited to relatively isolated findings about overtime, transport to and from home and time registrations. In one case, a violation of article 8 Waadi is found, with improper wage scaling, incorrect payment of overtime and no holiday allocation.

In the second series, the reports bear witness of more direct research, with investigations among subcontractors in the chain and temporary agencies that the main subcontractor has engaged. The reports contain records of interviews with the client and describes interrogations of the main user firm and hiring contractor. I-SZW prepares own protocols, includes statements from several legal representatives, visits the workplaces and sites of the (sub-) subcontractors. In one case, the

detailed examination of the compliance with applicable working conditions unveils a long list of dubious findings: the concerned temporary work agency places the hired workers falsely as newcomers, an unlawful method to economise on their pay; there is non-compliance with the applicable travel allowances, with the days off regulation, with the facilities and provisions for elderly workers and with the foremen bonuses. In another case, a foreign temporary agency led by a Dutch owner/director, the agency pays according to the collective agreement of the construction sector. However, workers receive two pay slips, one for the worker and the authorities in the country of origin, one for the Dutch authorities. The payslip for the country of origin records deductions that are not mentioned on the documents for the Dutch authorities (mainly for lodging and transport). Both pay slips do not make notice of overtime payments. The inspector's conclusion is that the agency does not fulfil the conditions and provisions of at least an equal treatment in line with the working conditions of the other workers under contract of the user firm.

I-SZW reports on *Road haulage* in five accounts with findings. The first requests result in relatively poor feedback. Starting from 2015, interviews with witnesses becomes part of the investigations. The content of the reports ameliorates substantially after the introduction of more specific questions in the requests. Besides questions about the pay related provisions of the collective agreement, the applicant asks more information about the factual rides, the hiring policy, outsourced haulage and the underlying commercial contracts. Consequently, the resulting reports contain much more useful findings. I-SZW remarks that Dutch companies have engaged relatively few Dutch drivers, some under a direct contract, but most of them temporarily engaged and/or through agencies or hired labour methods. The basic recruitment proceeds through intermediates; foreign drivers are engaged through foreign subsidiaries or chartering and leasing entities. Often, the foreign establishment carries out (part of) the work, under the guidance of the head quarter. The truckers drive trucks and semitrailers owned by the main firm, with the equipment stationed in a separate legal entity and then leased. Planning and guidance, calculating and direction take place in and from the Netherlands. The requested and annexed driver's logs clearly indicate that the foreign drivers carry out their work in the Benelux-countries, Germany, the north of France and the Scandinavian countries, not in the country of origin or establishment of the subsidiary. Non-compliance occurs regularly with foreign drivers; the hired drivers receive wages based on the pay regulations of the country of origin or establishment. The above-mentioned obligation to ascertain the compliance by hiring firms and subcontractors with the hard core of the provisions in the applicable Dutch sectoral agreement (in these cases the collective agreement for road haulage and mobile cranes) is not respected. Other irregularities cohere with the social security payments, the genuine character of the foreign establishment and the rules on driving time and rest periods. A chain of subsidiaries or apparently independent foreign entities masks and conceals the employer's role. The inspectorate investigations testify of the complexity to disclose the way rules and regulations are circumvented in often very sophisticated labyrinths of legal entities and contract forms. The inspection controls to a certain extent the commercial contracts, constituting the division of labour between the headquarter and its subsidiaries. However, this exercise does not answer the questions of the social responsibility and the functioning in practice.

I-SZW reports on *Contracting of work* pinpoint pay rolling and other outsourcing through the application of service-contracts. External firms deliver the workforce for production lines in plants. The applicant's key demands relate to the question whether this form of externalisation is contracting of work through the provision of services or hiring of a workforce in the sense of agency work. The first report with findings in this cluster turns out meaningless. This is a reason

for the applicant to submit a modified request. The findings demonstrate that the responsibility for the planning, work organisation and the direct leadership lies in the hands of the plant management. The workforce is subordinated to the plant leadership who decides and controls, distributes tasks and gives guidance, for instance, with regard to safety and health standards or clothing. The user firm owes or organises the used tools, machines and materials. I-SZW finds out that the invoices refer to the working hours, not to the provided overall services. One submitted file leads to a very substantial and solid report (of some 26 pages) with summaries of interviews (with the workforce and the plant leadership). I-SZW concludes that the practiced working method is about the hiring of workers through agencies or intermediates. Therefore, article 8 Waadi applies. I-SZW resumes that the investigators have found evidence of non-compliance with equal pay and pay related bonuses (for shift work) that workers of the user firm receive in similar functions. The work is not carried out in separate workplaces or with different leadership - the only difference in one meat processing plant is the colour of the disposable hygiene hairnet! I-SZW concludes that this is hiring of agency workers.

The investigation in the *Construction* sector leads to five reports with findings. The most striking finding is the appearance of labyrinths of subcontracting and chains of outsourcing and externalisation. In all investigated cases labour recruitment occurs through subcontracting and labour-only agencies, often with on top of the pyramid a Dutch owner or contractor. In the first layer of the subcontracting chain, specialised subcontractor operate. Lower down the chain companies can be situated with as main 'expertise' the supply of cheap labour, through hiring in and out. The first submitted requests refer to the article 10 AVV procedure; later on requests also refer to the article 8 Waadi procedure. I-SZW reports several breaches: too low scaling, irregularities with working time and travel regulations, deductions for lodging, non-respect for the provisions in the sectoral collective agreement for construction on the use of agency workers (equal pay!). The site management engaged by the main contractor executes the site leadership, with the hired workers subordinated to their direction. The submissions based on article 8 Waadi, result in reports with more elaborated information and useful evidence. I-SZW concludes a hiring of agency workers. The subcontracting agencies do not respect the obligation to ascertain the compliance with the hard core of the provisions in the applicable Dutch sectoral agreement. Other breaches are the incorrect wage scaling of workers, underpayment, improper application of working time regulations and several other provisions of the generally binding collective agreement. Moreover, the inspectors came across individual A1-declarations with reference to worksites that did not correspond to the building sites of the hired workers.

The submitted requests on *Shipbuilding* led to three files with several combined reports. The reason for this multiplication is the fact that the inspectorate traced in every file different (often-interrelated) firms. The cases consist of the recruitment and hiring of workers through foreign entities, whether subsidiaries or independent foreign establishments. The entities belong mainly to a Dutch owner/director. The hiring and recruitment is presented as the cross-border provision of services, with the foreign entities recruiting workers and providing these workers to a Dutch user firm. The investigation shows in some cases that even the salary administration is based in the Netherlands. I-SZW finds that the underlying commercial contracts do not underpin the hiring lower down the chain. The user firm and the provider of the workforce have not settled direct contracts for the provision of services. The user firm has no commercial relationship with the recruiting entities. The user firm denies any employer liability or social responsibility. The workers are confronted with non-compliance with applicable collective agreements and pay for agency

workers. Workers receive two payslips, one for the home country, and one for the host country authorities. The results show non-compliance with important pay related allowances, laid down in collective agreements, and long working hours. Part of the payment is tax-free. Foreign workers received an A1-form in the country of origin or establishment, although the application of the posting regime is questionable because the workers were allocated through a Dutch enterprise. The composition of the chain of subcontracting is key in these files. I-SZW explores the different layers and suggests that the large chain even ends up in undeclared labour.

Current labour cost saving methods

Before we come to a final assessment of the enhanced inspection that was introduced by the social pact 2013, we describe in this section some of the main characteristics of the different 'saving methods'. These methods have been treated in several studies, although the wording can be different, ranging from 'regulatory competition' to 'regime-shopping', 'social engineering' or 'social dumping'. One of the main characteristics is that several of the methods are not necessarily illegal. Some of these methods can be found in the shade of the law or the margins of the applicable regulatory frame, other methods profit from loopholes and contradictions in that frame. Some methods are perfectly legal, although they are morally blameworthy. Other methods are against the law, but because of the complexity of the legislative framework and the absence of straightforward redress mechanisms, difficult to tackle. Some methods can be traced by the enforcement and compliance authorities, but effective and dissuasive sanctions (especially in a transnational context) are non-existent.

However, most of the methods are planned, well-organised and set up with business consultants that can explain you that everything is perfectly legal. The methods consist of well-established and designed business models, often thought through in all legal details, which lead to competition based on wage costs and to distortion of competition with genuine companies that comply with the legal and conventional frame. A short overview of the different models is provided here.

- Savings on direct wage costs

Savings on direct wage costs result from non-compliance with collectively agreed wage and working conditions, underpayment, circumvention of a mandatory minimum wage, too low wage scaling (with, as a consequence, a mismatch of qualification and pay level), non-compliance with agreed wage harmonisation between industries (for instance, the equal pay principle for agency workers), too long working hours, the non-payment of overtime and other pay-related bonuses and from unreasonable deductions. In most cases the workers is not informed, is afraid to ask for redress or accepts the low pay, because of the imbalance in power and position on the labour market. In several situations, the net pay is still (relatively) higher than the possible earnings in the country of origin.

- Savings on employer contributions and indirect wage costs

Savings on employers' costs cover a range of wage-related financial obligations, varying from undeclared pay of part of the wage components and allowances, the search for cheaper conventional frames (non-binding agreements) and regime-shopping (with collective agreements that have a softer regime of employers' contributions), circumvention of (mandatory) employer contributions to industry-wide provisions and funds (vocational training, OSH and other social policy and protection funds), the flagging-out or the conversion of agency work into the provision

of services (no 'wage related costs' only 'invoices'). Labour becomes a 'commodity'. In one file, the go-between presented even the bypassing of obligatory trade union contributions as an advantage. The workers concerned have no clue about this type of circumvention or are difficult to motivate to act in favour of the compliance with these 'abstract' provisions.

- Savings on social security contributions

The savings on social security contributions result from the registration of workers in other constituencies than the country where the work is carried out. The method consists of the hiring of workers from low contribution countries and to employ them in countries with high social security contributions. A1-forms, which state that the workers is secured in the country of registration, suggest that everything is perfectly legal. The form is often used for posted workers or workers that are mobile and active in more EU member states. In a similar way, the form can be handed out for foreign self-employed. Other research has made clear that the use of an A1-form and an appeal to posting (even if it is just suggested) can hamper research and the control of regularity. It requires verification in the country of registration, which is time-consuming, and it requires the establishment of a working relation with foreign competent authorities.[12] Normally, this competence lies not in the hands of the labour inspectorate, thus, inspectors have to find their way with other institutions. Non-compliance with social security contributions is hard to tackle, also because the effect for workers is something in the future (pensions and other benefits) and the direct consequences were for a long time seen as a case for the country of origin. In the meantime, it has become clear that non-payment leads to the undermining of the welfare state (in both the country of origin and the host country).

- Savings on income tax, turnover tax and corporate income tax

Pay related tax savings appear in different ways, often as a result or combined with the other saving methods. Low wages lead to lower payroll tax, undeclared or untaxed allowances and other net payments diminish the total tax costs. Fiscal engineering and lack of clarity about where the turnover has been realised offer methods to lower the corporate tax. In situations with several subcontractors in a triangled cross-border context (with a country of origin, a host country and another country for the financial transfers), which regime applies and what has to be paid gets completely out of sight. The use of artificial establishments for the financial office in a country with no output and turnover leads to lower tax payments. This saving stays out of sight of the involved workers (and even of the compliance offices) or, if they have suspicion, the question is where to address this.

First synthesis of the findings

The Dutch social partners concluded in April 2013 a social pact with the government. The deal included one measure that aimed to improve the cooperation between the labour inspectorate and the social partners in the field of compliance with and enforcement of collectively agreed pay and working conditions. The responsible department of the ministry of labour (I-SWZ) engaged additional (temporary) staff for the years 2014-2018 (8.5 labour inspectors). The I-SZW unit functions in practice on the basis on submitted requests. I-SZW answers the raised questions in reports with findings. Based on the I-SZW reports (normally combined with own research data), the applicant starts negotiations with the involved employer(s) or principal(s). It can lead to talks on compensation and recovery, to possible conventional redress, legal action and juridical claims. A team of researchers analysed a representative sample of the submissions, dating from the

period 2014-2015, and the subsequent reports with findings. The submissions refer to procedures stemming from two legal acts, i.e. article 10 of the AVV act and article 8 of the Waadi act. The demands focus mainly on doubts about fair and proper pay and pay related working conditions. The analysed files stem from both private and public projects, including public procured sites and workplaces. For some of the concerned labour, the Dutch labour market shows signs of shortages, notably for the repetitive manual work that is characterised by the ILO as 3D-jobs (dirty, dangerous and demanding). The low-paid work that has to be carried out is commonly not very attractive for native workers, with poor working conditions, long working hours, little autonomy and meagre career perspectives. And even in more qualified work, the payment and working conditions have eroded as a consequence of the ongoing flexibility and the signalled mismatch of qualification and wage scaling.

Pretty much every of the submitted requests with suspicion of non-respect and non-compliance deals with projects and workplaces that carry out work with one or the other type of outsourced labour. This takes the form of a subcontracted workforce, hired and leased workers, external recruitment, agency work and posting of workers (and self-employed). Pretended contracting, based on the provision of services, blurs in some cases the labour relationship of the involved workers. There is no substantial difference in the use of outsourcing in public or private works, once the investigation goes further down the chain of subcontracting. The externalisation often takes the form of the recruitment of a foreign workforce through establishments abroad. The introduction of a foreign legal entity in the chain complicates the control and enforcement. It can lead to delays and even to defeat. Investigation of facts and verification of data in a foreign constituency depend on transnational cooperation and mutual assistance. The foreign (artificial) entities often turn out to be initiated by Dutch user firms or headquarters, with Dutch owners/directors. Some CEE-businessmen have learnt how to play the game and in the meantime established their own recruitment agencies for work abroad.

One of the greatest difficulties that the inspectorate has to deal with is that the verification of compliance in legal terms also falls under a set of other regulations, some of these regulations even outside the social policy area. The competences to check the related relevant facts, for instance the control of the genuine character of a company, the choice of the labour contract, the application of the coordination of the social security or the use of the self-employment status belong to other ‘silos’ of a country’s regulatory frame. Moreover, the demarcation between these laws and regulations differs from country to country, and so does the competence to control and enforce. So far, no country has introduced an enforcement and compliance office with integral and horizontal competences. Even worse, only few countries have established a minimum of structural cooperation between the different ‘silos’. Consequently, the poor reconciliation between the different national institutions, combined with the signalled loopholes, builds a playground for dishonest practices. To give just one example, in some of the cases, the workforce is clearly active in the frame of the free movement of workers (and then, the complete regulatory frame of labour law and conventions applies). However, workers are working with an A1-form, as if they were posted. The labour relation meets in no way the requirements of being posting, if only because of the fact that the intermediate agency is based in the Netherlands. In such a situation, the Dutch firm settles the provision of workers and the delivery of an A1-form is at odds with the legal frame as enshrined in the EU Regulations of the social security coordination.

Circumvention mechanisms

The analysed files do not bring the final answer to the question which mechanisms are at stake. It is also not possible to give an estimation of the size of the use of for instance letterbox companies or other artificial arrangements. What the analysis of the files shows is proxy evidence of the existence of several partly intertwined mechanisms that serve in the search for cheap labour. Moreover, the files testify to more than simple loopholes and inconsistencies in the legislation. These loopholes, combined with a lack of coherence in the overall policy and with the absence of concertation between the different policy areas, lead to 'creative' forms of labour recruitment and hiring of workers. In practice, the inspectorate is provided with limited resources and instruments to tackle the abuses arising from these forms, also because there was a lack of interest from the side of the legislator for the control and enforcement problems that the inspectorate and other compliance offices had to face. If we abstract from the individual files, we can resume five different circumventions mechanisms.

a. *Fraudulent contracting/payrolling*

The fraudulent use of contracting suggests that a firm supplies services with its own workforce to a user firm, based on a commercial contract. The service supplier commits to deliver a result at a specified price, with all the risks on the supplier. The supplier is the employer and has to decide on the size of the necessary workforce. Therefore, the user firm has no employer responsibility. The transaction is settled through invoices.

In the analysed files, the contracting method appears in different industries (for instance in the poultry sector). The supplier is 'specialised' in the take-over of the execution of the production. The supplier recruits the workforce and uses this method to circumvent the rules that are normally applicable for the supply of temporary workers through agencies. Consequently, the supplier bypasses the binding rules between the agency sector and other industries about the equal treatment of workers. As has been said before, the agency sector is bound to respect the wage system that applies in a user firm, notably the collective agreement based pay. The bypass results in a circumvention of the collectively agreed wages and pay related provisions. The only applicable backup in such situations is an appeal on the statutory minimum wages (this falls outside the scope of the enhanced compliance procedures).

For quite a while, this method of contracting took place in a legal vacuum, with only one reference in the Civil Code that was originally meant for the construction sector (article 750.1 Dutch Civil Code). In the meantime, however, the first court cases have been finalised with judgements that limit the possibilities of bogus practices. The accused suppliers turned out to be active as suppliers and as temporary work agencies. In one case related to the use of an artificial structure, the judge opined that the plain fact of some supervision from the side of the supplier is not enough evidence for a commercial contract. The Dutch legislator has initiated a change of the Act on statutory minimum wage in order to prevent further abuses. However, an effective tackling of this method is a time-consuming legal jungle.

b. *Chains of subcontracting*

A focus on chains of subcontracting emerged already in the 1990s, after the introduction of the internal market and the following market expansion. A functional division of labour, notably in construction, based on a production chain with on top a main contractors and several layers of specialised subcontractors is not new. However, the experience of the inspectorate and other compliance offices shows that splitting the execution in chains of separate legal entities is not

always based on knowhow and the search for specialists. In some of the analysed cases, complex chains of hiring, outsourcing and subcontracting exist, whereby figureheads serve as the company representative. The middlemen of foreign establishments and subsidiaries are hired to make the real owner untraceable for the authorities. In this area, the deregulation of company law in the member states and the EU is influencing: suppliers pop up through cheap and easy constructed legal entities (ready-made companies), go bankrupt and start all over again in no time. The longer the chain, the more difficulties the compliance offices have to get insight information and a clearer view on the genuine character. A new Dutch act against artificial arrangements (WAS-act) provides workers with the legal possibility to make the client and/or the main contractor liable for the non-compliance with pay of entities further down the chain. If a subcontractor fails to meet his/her obligations, the next higher layer becomes liable. The act aims to promote genuine subcontracting and the prevention of distortion of competition. Given the serious problems that the inspectorate meets in figuring out and verifying the contractual and employers' relations in some of these chains, it might be very complicated for workers to apply this liability clause and obtain justice. The analysed cases stem not optimistic in this regard.

c. *Foreign legal (artificial) entities*

The use of artificial legal entities (such as letterbox companies) is well known in the field of 'fiscal optimisation' and the whitewashing of capital (Panama papers, Lux Leak et cetera). Letterbox companies can be defined as artificial legal entities (often registered in another constituency) that serve for financial transactions, with no or only symbolic activities in the country of registration.[13] The phenomenon made its entrance in the early 1990s in the transport sector (the reflagging of vessels) as a means to circumvent social policy obligations and mandatory working conditions.[14] However, the application is 'democratised' as the deregulation of company law brought the founding of a company, whether real or fake, within the grasp of everyone. In recent years, artificial entities pop up in every industry as soon as outsourcing and cross-border recruitment are at stake. Through this mechanism regime-shopping in the EU internal market is no longer a hypothetical notion in the search of cheap labour. Based in another constituency, the entities fall outside the competence of the investigating authorities, and, even more important, the labour inspectorate has in fact no say about the genuine character of a registered company; not in the host country and certainly not in the country of registration. Consequently, artificial arrangements are effective means to hinder compliance control. In one of the analysed files, the Dutch owner/director of a Dutch firm, who is also the sole owner/director of a Bulgarian subsidiary, knows exactly how to handle. At the start of the interview, he makes it absolutely clear that the Dutch inspectorate has only competences to investigate at Dutch territory ('I will give no information about my Bulgarian firm, address yourself to the Bulgarian authorities').

The internal market regulations and free movement principles (freedom of establishment, free provision of services) create the possibilities for these legal entities, once registered in a member state, to circulate all over Europe as service providers. It is almost impossible for a country, confronted with the presence of an artificial entity to have the registration withdrawn in the country of registration; and this is certainly not a competence of the inspectorate. The same difficulties appear with an A1-form, registered and handed out in another member state. In cases where the compliance with both legal provisions are at stake (Is this a genuine firm? Is this a genuine A1-form?), the inspectorate stands empty-handed. In practice, two cross-border methods often go hand in hand: the use of artificial legal entities that invoke the application of the free provision of services with posted workers (see below). Recent studies have shed a light on the

abuse of letterbox companies and the recruitment of workers through these channels.[15] The letterbox method covers up the real labour relation, leaves much space to bypass employers' obligations and labour recruitment provisions, and enables circumventing mandatory pay and working conditions and evading tax and social security contributions. The patchwork of regulations that applies once these entities enter, combined with poor transnational competences and no instruments in company law with regard to the genuine character of the entities, obstructs and effective tackling of these practices. The files demonstrate how this method works: foreign legal entities are empty shells, with artificial establishments and local strawmen. The registration is done in a minute, and so is the bankruptcy. If investigations start, the entity is withdrawn from the territory. Control in the host country is permitted, but limited and the main questions related to the genuine nature cannot be addressed. Owners know the limits of the compliance authorities with regard to a foreign entity, assisted by an industry of business consultants that can spell out how perfectly legal the procedure is.

d. *The provision of services with posted workers*

Posting of workers in the frame of the free provision of services ranks under the core economic freedoms in the EU internal market. In an ideal world, the provision of services with posted workers is based on a functional division of labour between a main contractor and a specialised subcontractor. The subcontractor carries out work based on a commercial contract gained in a tender or resulting from long-standing cooperation or work-sharing. In such a situation, the main contractor is responsible for the overall coordination in the chain. The 1996 Posting of Workers Directive aims to protect the workers that are posted. The starting point was compliance of the supplier of labour with national social policy frameworks and collectively agreed working conditions, with a hard core of minimum prescriptions. This should lead to the right balance between the protection of employees on the one hand and market opening on the other hand. In recent decades, posting has become instrument, characterised by complex, semi-legal or dubious recruitment arrangements that are hard to control and enforce.[16] The so-called 2014 Enforcement Directive (transposed in the Netherlands in 2016 in the WagwEU) was meant to repair the main deficits of the Directive in the field of registration and enforcement mechanisms.

The analysed files confirm the findings in some of the earlier research: a lack of information about the size and the composition of the workforce, no transparency about the necessary underlying commercial contracts, no clear indications about the temporary character of the work, breaches of the hard core of working conditions, unverifiable deductions, long working hours and no overtime pay, and serious question marks with regard to the payment of social security contributions. The involved Dutch firms and contractors work with foreign agencies and recruitment establishments, often owed by Dutch executives. These recruiters enter the market under the pretext of the cross-border provision of services, although de facto the only core business of the supplier is labour recruitment. Posting serves to meet labour shortages and to find workers for repetitive, low-paid and dirty work. It helps to keep the wages in some labour intensive sectors low. In legitimate cases of posting, the user firm has already the advantage of a supplier that calculates with low security costs and only the minimum of pay and working conditions. In the investigated dubious cases, the breaches of unpaid overtime, unjustifiable deductions for lodging and travel and other non-compliance with the hard core of working conditions, makes the gap with the ordinary pay according to Dutch levels much wider. In these cases, this is also covered up with two pay slips, one for the Dutch authorities and one for the home country, with no clarification of the real pay. In the dishonest cases, the formal reference to free service provision with posted workers is a

façade for non-compliance. The incubators of this method know very well that control is impeded, that the posting reference leads to time-consuming research (verification of registration, contracts and pay slips, checking of the genuine character of A1-forms and of the legality of firms and agencies), consultation of colleagues abroad is needed and that competences to tackle breaches effectively are missing. In short, invoking posting provides a fine alibi to hamper or even to end investigations.

e. *Regime-shopping in the field of social security and taxation*
Some of the other methods referred already to the possibility to exploit the different levels and systems of social security (and taxation - not taken up here). These systems are played off against each other. Basically, this method manifests in two features. The first feature is the use of self-employed (both domestic and foreign). Although the abuse of the self-employed status did not belong to the core part of the analysis, it came forward, notably in the construction cluster. The second feature, regime-shopping with the A1-form emerged more regular in the cases. A1 serves as the proof of social security registration in the country of origin (or sending). It is delivered by the competent social security in institution in that country. In principle, the authorities in the host country have to accept this delivery. Jurisprudence of the CJEU and practical experiences indicate that it is extremely difficult to contest the legality of the A1-form in the host country. In case of fraud suspicion, the host country has no legal means to act independently from the office that delivered the form. The supplying office has the task to check and to take action; and ultimately, the competence to annul and withdraw the form. Compliance offices in the host country are thus completely paralysed in this regard. This is probably also the reason why so few submissions of non-compliance, with important doubts about regular social security payments, in the analysed files are handed over to the social security authorities.
Next to the lower contribution level, the method appeals if wages are low, bonuses are paid tax-free or as net none-wage related allowances. The result is lower charges and a saving of contributions. The delivery of two pay slips points often in this direction; the net allowances are presented as part of the pay, in order to reach the mandatory level in the host country (and justify the 'equal treatment'). In the analysed files, most foreign workers have received A1-forms, even in situations where after a closer look the issue of the form is not justified, for instance for workers that are supplied through administration offices established in the Netherlands. Other irregularities are the exceeding of the time limit and maximum duration, forms that are handed out for other sites and the use of A1-forms in work that has a permanent character. A rotation of workers covers this up. In the end, the employers' contributions in the area of social security amount to a much lower level.

The cooperation assessed

Before we come to the recommendations, this section looks after the evolution of the cooperation between the applicants and the inspectorate. This cooperation between the applicants (mainly trade union FNV) and the I-SZW unit has improved over the years. It took some time to figure out and clarify the mutual expectations, but both the submissions and the reports with findings have improved in quality and content. The cooperation is still limited to the compliance with collective agreed pay and working conditions. To a certain extent, this is a lost opportunity. Given the occasional 'bycatch' that can be found here and there in the reports with findings, the analysed files might give rise to more fundamental investigations, dedicated to the working and living conditions of the workers concerned.[17]

The files provide also information about question marks and possible offenses in other policy areas, especially with regard to evasion of social security obligations or tax circumvention. In that broader area a cooperation with social partners, would be very welcome. The inspectorate has a policy of restraint with regard to picking up non-submitted items. The tackling of additionally found (minor) breaches and offenses, in the frame of a compliance investigation, is not always seen as fair. The policy is to report only major abuses to other services. This policy can be questioned, as the analysed mechanisms make clear that also minor breaches can be the tip of the iceberg. Cases with breaches in several related policy areas (pay, working conditions, taxation and social security) should lead to further investigations. Case studies on fraudulent practices with deliberate circumvention of the mandatory regulatory frame by notorious letterbox companies that turn up from time to time reveal that 'fairness' is not at stake.

Some additional findings pinpoint problems (and opportunities) that still ask for improvement of the cooperation. A too narrow formulated submission leads to lost opportunities. The same reasoning applies to the restriction to the two main articles that build the legal frame for the compliance procedures. In cases with no generally binding collective agreement, the fall-back comes from the statutory minimum wage act (WML). Although this does not belong to the competence of the I-SZW unit that looks after contract compliance, respect for the WML is part of the controlling activities of the labour inspectorate. Formally, the trade unions have no compliance tasks in that area. This should not prevent them from questions related to the WML in their submission. The agency work act (Waadi) includes also other articles that could be integrated in the work of the different actors. For instance, article 7a prescribes a registration duty that is useful in investigations related to abuse of the contracting method. Another key issue for the cooperating actors is the compliance with the applicable working time. Excessively long working hours are commonplace and the control and enforcement of the compliance with overtime payments is complicated. In this area, evidence seeking is even more of an individual kind and depending on the quality of the registration by or administration of the individual worker. A stronger focus in the cooperation on working time regulations, next to pay, is needed.

Problematic for all partners in the compliance campaign is the lack of effective sanctions. The fact that the tackling of artificial arrangements and of fraudulent cross-border labour recruitment very often comes too late or that these practices can pop up repeatedly, leads to serious frustrations. The sanctioning is relatively poor, with no transnational effect, and the exclusion of the market entrance clashes with the freedom of establishment and the free provision of services. Competence to deregister establishments lies outside the competences of the inspectorate and social fraud is still not seen as a major offense that could argument a European-wide ban. Especially in this area, a more horizontal transnational cooperation right across all relevant policy areas is of the utmost importance. In some of the analysed files, firms are traced that are active in several countries, using the same methods, whilst their presence in the country of registration is only symbolic. This asks for cooperation, in the control and compliance activities, but also in the enactment and implementation of sanctions.

Recommendations

This report lists a broad range of (possible) breaches, with the main focus on the compliance procedures that handle these breaches. Most often, the analysis deals with control and enforcement policies, not with preventive action. Nevertheless, controversial and notorious cases probably have also a preventive effect, not the least because such cases have a strong influence

on policymaking. The total size of the compliance activities, however, is too limited to function as a serious deterrence. Therefore, activities on the preventive side of the compliance, based on the cooperation of the social partners, stay of great importance. Approved examples are project-specific social clauses, codes of conduct, improvement of internal discipline and of the own compliance activities, effective liability procedures and fair chain policies. Early consultation of workers representatives with regard to outsourcing, the use of agency work or other externalised recruitment can contribute to a transparent record.

The found cases are all about drastically saving of labour costs in a period of relatively high unemployment and ample supply of labour. The important question is of course what will happen in an economy that is growing (in both, the receiving and the sending countries). Future labour market frictions will have their price and workers will probably become more aware of the value of their labour. But, it is unclear whether shortages in low-paid and unattractive work will lead to improved pay and working conditions (and an end to social dumping practices).

Our recommendations in the field of control and compliance policy are listed below.

a. Compliance control should be executed in a horizontal and integrated manner, across all relevant policy areas. Silo thinking on the part of the competent authorities leads to inadequate and fragmented control that does not give justice to the potential functioning of the mechanisms that can be at stake. Competences to trace irregularities have to be aligned. A coherent policy can be motivated by two arguments: first, the reciprocal interaction of the different policy areas; secondly, the practical experience with an accumulation of abuses in compliance procedures. The legislator needs to acknowledge and enable this interaction more.

b. The aim should be a further improvement of the cooperation in the compliance procedures. A broader range of questions related to content and juridical aspects in the submission leads to a more complete report with findings. It is commendable to share other available knowledge and information and to ask for a confirmation of such data. The FNV has the policy not to ask for information that is already well-known. However, a brief submission leads to a thin report, with no use in eventual further proceedings. In almost all files, hiring and external recruitment arrangements appear; therefore, it is recommended to include the second procedure (article 8 Waadi on agency work obligations) by default in the ordinary article 10 AVV procedure.

c. We argue to broaden up the scope of the submissions also from a legal perspective, although it looks at first glance as if the social partners have neither a role, nor the competences to deal with the related civil-law procedures. Moreover, recently the wording of article 10 AVV has changed. The change implies that submitted requests can be answered, not only with the findings of the respective investigation, but also with findings stemming from other available data on ‘the compliance with the act on statutory minimum wages and paid holidays, the act on temporary agency work, working time regulations and related provisions, as well as the occupational health and safety regulations’. This provides the possibility to ask from the scratch for results of compliance control in these related areas.

d. Social partners have to do some work in their own ranks. Non-payment of social security contributions in a sending country is for a long time seen as irrelevant for the actors in the host country. Some undeclared practices are tolerated in society and, therefore, have no priority. Minor breaches slip through the mazes and the internal discipline is still less developed than the wish to increase the membership of the organisation. There is a clear need of a conventional and

legal coherence and consistency in enforcement and control, and the social partners should take the lead in this area. Industry-wide or paritarian institutions can serve well in this respect, especially if these institutions have the power and competence to act on behalf of both bargaining partners. Given the complexity of the encountered cases, this has to go hand-in-hand with a further enhancement of the cooperation with the labour inspectorate (and more staff for the inspectorate).

e. The absence of control of social security contributions is a serious omission, as these contributions serve to build an important part of the (future) working conditions of workers. Regularity with the obligations in this area is of importance for both the sending and the receiving country. It prevents workers from working uninsured in foreign constituencies, and it is a contribution to the sustainability of our welfare states. In the Dutch situation, the social partners, so far, have neglected this aspect in their joint actions. This is surprising, because the social pact from April 2013 states in one section that the responsibility of social partners in the (re)design and sustainable set-up has to be strengthened. This reasoning brings us to the conclusion that more activity is needed from the social partners' side.

f. Competences to decide on and to control compliance with the regulatory framework of pay, working conditions, as enshrined in collective agreements and labour legislation, should be more allocated to the country of employment. This asks for a reestablishment of the 'lex loci laboris' principle. Free movement of workers will stay upright if this free movement takes place grounded on the principle of equal treatment in the territory where work is carried out. The position of the CJEU (for instance, in the Luxemburg case) that it is or no longer up to the member states in the internal market to determine on the applicable social legislation should be abolished. Moreover, the trade union movement must have the right to take industrial action against suspicious legal entities and practices, independent from the origins of the firm or involved workers. Acting against non-compliance has nothing to do with the creation of barriers for the free provision of services.

g. The same reasoning applies for the determination of the genuine character of a firm. Recruitment takes place with cross-border activities through constructs, established in other constituencies. The possibility for receiving countries to verify the legality of the construct is very limited. Circumvention practices related to artificial legal entities, acting in the frame of the freedom of establishment, have to end. This has to be realised by policies that lie partly outside the social domain, such as national and European reregulation of company law. Moreover, there is a need for a systematic extension of the inspectorate's competence towards the control of the genuine character of the legal entity in the receiving country.

h. Finally, a very practical recommendation about the working methods. Control on legitimacy is sometimes much easier with the recourse to the digital highway. Several countries have installed (online) company registers that can at least give a minimum of information on the real character of a company and its activities in the country of registration. But also advertisements on the Internet can speak volumes. Google maps and other search machines provide information on addresses, establishments, court cases, disputes and other relevant data for further research. Intensified exchange with competent colleagues in other member states often delivers quick results. The compliance policy has to be more pro-active in the use of social media.

[1] Stichting van de Arbeid (the Labour Foundation), April 2013, *Perspectief voor een sociaal én ondernemend land: uit de crisis, met goed werk, op weg naar 2020.* The Labour Foundation is a national consultative body organised under private law that advises the government on socio-economic and labour-related topics. Its members are the trade union confederations and three central employers' associations in the Netherlands. The Labour Foundation prepared the social agreement that the government later on endorsed. The full text of the pact can be downloaded: http://www.stvda.nl/~/media/Files/Stvda/Convenanten_Verklaringen/2010_2019/2013/20130411-sociaal-akkoord.ashx

[2] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'). The Netherlands implemented this so-called Enforcement Directive in 2016 in the WagwEU (Act of 1 June 2016, Official Journal. 2016, 219). The Act entered stepwise into force in June and July 2016 (Decision of 8 June 2016, OJ. 2016, 220). The (earlier) Act on artificial arrangements (WAS) that was concluded in June 2015 had already anticipated on several aspects of the Enforcement Directive.

[3] The research was based on a proposal drafted by the author after he had the opportunity to examine and explore some ad random files in the summer of 2016. The proposal was to analyse the files, to look after the use of artificial arrangements and other mechanisms and to map developments in the field of control and enforcement.

[4] See: http://www.eurodetachement-travail.eu/Default.asp?rub=&lang=_en

[5] The team members were Jan Cremers (Tilburg Law School) as the coordinator, Hanneke Bennaars (Law faculty Amsterdam University) and Imke van Gardingen (lawyer and juridical advisor FNV). Stefanie Sprong and Amrit Sewgobind, both working at the FNV compliance unit, assisted permanently and build the bridge between the research team and the relevant union officers and departments.

[6] Published in Dutch and available online: https://pure.uvt.nl/portal/files/16689636/Boekje_3_jaar_naleving.pdf

[7] https://www.inspectieszw.nl/Images/Cao-nalevingsonderzoeken-door-de-Inspectie-SZW_tcm335-379300.pdf

[8] https://www.inspectieszw.nl/Images/Aanpak-schijnconstructies-door-de-Inspectie-SZW_tcm335-379299.pdf

[9] J. Cremers, Economic freedoms and labour standards in the European Union, Transfer, Volume 22-2. Sage publishers: http://journals.sagepub.com/doi/full/10.1177/1024258916635962

[10] Article 8 Waadi prescribes that temporary agency workers have to be subject to at least the same working conditions that apply for workers in equal or comparable occupations in the user undertaking that hires workers from agencies. The article refers to pay and pay related conditions and to provisions as laid down in an applicable collective agreement in the user firm on working time and rests, works shifts, overtime, holidays and work on public holidays.

[11] Article 10 Act AVV provides associations of employers and workers that have concluded generally binding collective agreements with the right, in case of concrete suspicion of non-compliance, to submit a request for investigation. The labour ministry guarantees the investigation and reports on the findings. The report with findings may include other available data on the respect for the Act on statutory minimum wage and paid holiday, working time and occupational safety and health. The report includes no data that disclose the identity of involved workers.

[12] Cremers J., *In search of cheap labour*, International Books, 2011. http://www.clr-news.org/CLR-Studies/Websummary.pdf

[13] The OECD Glossary of tax terms defines LETTER-BOX COMPANY - A paper company, shell company or money box company, i.e. a company which has compiled only with the bare essentials for organization and registration in a particular country. The actual commercial activities are carried out in another country.

[14] One of the most pregnant cases (Viking, 2003) was brought to the Court of Justice of the European Union: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=71495&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=87106

[15] See, for instance a SOMO-report, commissioned by the ETUC: https://www.etuc.org/press/letterbox-type-practices-avoiding-taxes-and-exploiting-workers-across-eu#.WKQ0JIczW70

[16] For earlier research see note 9 and 13.

[17] The labour inspectorate cooperates in a more formalised way with several other compliance authorities, like the tax office and the social security office, in the fight against artificial arrangements. It would be logical to install a similar cooperation in the area of contract compliance.

Annex. Matrix for the analysis

Working conditions		
Aspect	***Instrument/regulation***	***Relevant questions/items***
Pay	- WML (Statutory Minimum Wage)[17] - AVV-Act (general binding collective agreements) - Waga/WagwEU (Dutch posting of workers Act) - Waadi (Dutch agency Act) - Company agreements (if any)	- Pay slips - Wage scaling - Applicable collective agreement - Conditions formulated in labour contract - ID - Gross wage/calculation period - Wage structure and components - Registered hours – paid hours - Bank account copies
Periodical bonuses	- AVV-Act - Waga/WagwEU - Waadi	- See beyond - Holiday payments - End of the year bonus - Extraordinary bonuses
Holiday	- Waga/WagwEU - Waadi - AVV-Act	- Paid holiday (days) - Public holidays
Working time	- Waga/WagwEU - Waadi - AVV-Act - Working time legislation	- Start and end working day, pauses - Agreed size working day - Working time registration (who and how) - Maximum working time - Overtime
OSH	- Waga/WagwEU - Waadi - AVV-Act - OSH-legislation	- Dangerous work/protection/extra allowances - Protection measures and equipment - OSH introduction on the spot/language - Sometime: registration of workers present.
Allowances for travel, lodging and food	- WML (partly under preparation) - Waga/WagwEU - Waadi - AVV-Act	- Who pays transport (also to and from the host country), lodging, food - Daily allowance for work abroad? - Residence/accommodation - Deductions for intermediate activity
Posting or free movement	- Waga/WagwEU	- Notification posting - Commercial contract for posting - Temporary nature - Starting date/agreed period posting - Posting in another MS than the state where normally work is carried out (Rome 1) - Return settlement after posting period - Type of work agreed versus work carried out - Posted company takes care of transport, lodging, accommodation; or the worker can declare? If yes, how? - Earlier posting periods of the same worker, with the same activities.

Social security		
Aspect	***Instrument/regulation***	***Relevant questions/items***
The applicable social security scheme (country and status)	- EU Regulation coordination social security 883/2004 - Implementation Regulation 987/2009	- Since when in the Netherlands? - Type of residence (what is agreed/written in the labour contract) - Character work carried out (temporary/permanent)
Genuine registration/ genuine insured	- WagwEU - Electronic Exchange of Social Security Information (EESSI)	- Payment of contributions in the state where the work is normally carried out or? - Registered seat employer
A1-form	- Coordination regulations and decisions Administrative Commission EU - Internal Market Information System (IMI) - Electronic Exchange of Social Security Information (EESSI)	- Form is provided where, when and by whom - Duration and validity of the form - For which type of work, where and under which status (worker/self-employed)
(Taxation)	- 183-days regulation	- Assessment of temporary character (days present in the host country). - Who is the real/material employer - Pay cannot be withdrawn from the profit of a permanent settlement/subsidiary in the host country or other permanent seat, like a selling point or office - Is the assignment regularly for a short period of time (in a row)

The labour relationship		
Aspect	***Instrument/regulation***	***Relevant questions/items***
Worker or self-employed; the law that is chosen for the labour relationship	- Rome 1 Regulation - Executive Order (Act under preparation) - Case law, for instance on subordination and the presumption of a labour relation	- Labour contract or contract for the provision of services/commercial contract for subcontracting - Invoices - Who is the client/principal - Who pays and how does this relate to the agreed payment procedure - Daily supervision, subordination, planning. - Who owns/provides the equipment - Work is for risk and account of?
Who is the employer	- Civil Code (BW) - WagwEU	- Since when engaged by the firm - Notice periods and systematic - Dismissal procedures - Contact person - Sick leave and reporting - Who pays the wage and how does this relate to the agreed contract - Who leads the daily work carried out and how is the real subordination
Hiring/subcontracting	- Waadi - Acts on Chain liability - WagwEU	- Control of hiring obligations - Subcontracting agreement/commercial contract - Actual chain of subcontractors - Organigram
Written information on the labour relation	- EU Directive 91/533/EEG - For the NL: Book 7 art. 655 BW (Civil Code).	- Duration of the work - Payment in which currency - Allowances in cash and in kind related to the fact that the work is carried out abroad - Return regulations

Recruitment/hiring		
Aspect	***Instrument/regulation***	***Relevant questions/items***
Conditions for hiring and agency work	- Waga/WagwEU - Waadi - AVV-Act	- Control of hiring obligations - Subcontracting agreement/commercial contract - Actual chain of subcontractors - Organigram
Information on recruitment conditions	- Waadi	I-SZW can provide applicants with data that are necessary for compliance control of collective agreements
The genuine undertaking	- EU Enforcement Directive (art. 4.2) - WAS (Act on artificial arrangements) - Waadi (art. 7a and 8) - EU-Regulations coordination of social security (883/2004 and 987/2009) - (taxation)	- Establishment of statutory seat, administrative seat, offices and premises - Registration chamber of commerce/company registers, - Where are tax and social security contributions paid - Licenses, permits, certification according to national tradition/rules - Main activity/nature of the activity in the country of establishment - Size of portfolio, volume and turnover in the country of establishment. - More than internal managerial work in the country of establishment - Country/community of the recruitment - Country/community where posting starts - Locality of leadership, form and frequency of actual supervision of activities - Chosen law for the contract with the workers and with the user undertaking/client - Seat of the bulk of the company's activities and of the central and personnel administration - Does the posted worker fulfil all obligations in the country of origin (for instance with regard to residence and labour). - Tax law speaks about unlawful if the company is not established based on valid entrepreneurial arguments that reflect the economic reality.

Dutch abbreviations of legal acts

- AVV-Act - Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten (Act on the Generally Binding Effect of Collective Agreements).
- Waadi - Wet allocatie arbeidskrachten door intermediairs (Agency Work/Placement of Personnel by Intermediaries Act).
- Waga/WagwEU - Wet arbeidsvoorwaarden bij grensoverschrijdende arbeid in de Europese Unie (Act on the Working Conditions for Posted Workers). The Waga was consolidated in the WagwEU after the transposition in Dutch law of Directive 2014/67/EU on the enforcement of posting rules.
- WAS - Wet Aanpak Schijnconstructies (Act on Combating Artificial Arrangements)
- WML – Wet Minimumloon en Minimumvakantiebijslag (Act on Statutory Minimum Wages and Minimum Holiday Pay).

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